

**STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND**

**BEFORE THE CHIEF PROCUREMENT OFFICER**

DECISION

In the Matter of Protest of:

CASE No's 2009 – 131 & 132

UGL Unicco

Sodexo Education

Materials Management Office

RFP No. 5400000925

Facilities Management Services for

South Carolina State University

POSTING DATE: September 14, 2009

This matter is before the Chief Procurement Officer (CPO) pursuant to letters of protest from UGL Unicco (Unicco) and Sodexo Education (Sodexo). With this request for proposals (RFP), the Materials Management Office (MMO) attempts to procure facilities management services for South Carolina State University (SCSU).

Unicco protested MMO's intent to award to Aramark Higher Education (Aramark) alleging: (1) "Aramark Higher Education was allowed to provide information in the proposal document that was in breach of the requirements of your request for proposal and provided an unfair advantage that influenced the evaluation process", (2) "Unicco feels that these "gifts" were misrepresented" and that the "gifts" offered by Aramark violated the Consolidated Procurement Code's regulation prohibiting gifts [19-445.3000], (3) Unicco also questions the ability of any vendor to provide the services outlined in the solicitation to at (sic) a rate less than the \$5.3 million annual budget", and (4) "Furthermore, we are concerned that this information was allowed to be redacted until formally requested a second time."

Sodexo protested the intent to award to Aramark alleging, "It has come to our attention that our competitors were allowed to provide financial information in the proposal document that was contrary to your request for proposal (RFP). This financial information was shared with the evaluation committee giving our competitors an unfair advantage in the evaluation process." The information

shared with the evaluation committee noted in both letters refers to two pages that Aramark submitted with its technical proposal regarding an investment at SCSU of \$1,260,000. [Ex. 13]

Since both protests result from the same procurement and the issues alleged are similar, the CPO conducted one hearing to hear both matters on September 2, 2009. Appearing before the CPO were: Unicco, represented by John Schmidt, Esq.; Sodexo, represented by James Craig, Senior Director of Business Development; Aramark, represented by Wade Mullins, Esq.; and MMO, represented by John Stevens, State Procurement Officer. SCSU attended the hearing, but chose not to take an active role except for a closing statement by John Smalls, Senior Vice President.

### **NATURE OF PROTEST**

The letters of protest are attached and incorporated herein by reference.

### **PROTEST ISSUES AMENDED OR WITHDRAWN**

During the hearing, Unicco withdrew certain protest issues. Regarding protest issue (2), that “Unicco feels that these “gifts” were misrepresented”, specifically, its allegation that the price concessions offered by Aramark were in violation of the regulation prohibiting gifts, Unicco withdrew this issue, but retained the allegation that Aramark misrepresented the financial information in its offer. Unicco totally withdrew its allegations that: (3) “Unicco also questions the ability of any vendor to provide the services outlined in the solicitation to at (sic) a rate less than the \$5.3 million annual budget”, and (4) “Furthermore, we are concerned that this information was allowed to be redacted until formally requested a second time.”

The remaining issues are as follows. For Unicco: “Aramark Higher Education was allowed to provide information in the proposal document that was in breach of the requirements of your request for proposal and provided an unfair advantage that influenced the evaluation process.” For Sodexo: “It has come to our attention that our competitors were allowed to provide financial information in the

proposal document that was contrary to your request for proposal (RFP). This financial information was shared with the evaluation committee giving our competitors an unfair advantage in the evaluation process.” Both relate to the financial information submitted with Aramark’s technical proposal.

### **FINDINGS OF FACT**

The following dates are relevant to the protest:

1. On May 28, 2009, MMO issued the RFP. [Ex. 2]
2. On June 25, 2009, MMO issued Amendment No. 1. [Ex. 1]
3. On June 11, 2009, MMO and SCSU conducted a pre-proposal conference.
4. On July 2, 2009, MMO issued Amendment No. 2. [Ex. 6]
5. On July 6, 2009, MMO issued Amendment No. 3. [Ex. 8]
6. On July 14, 2009, MMO issued Amendment No. 4. [Ex. 9]
7. On July 20, 2009, MMO opened the proposals received.
8. On August 11, 2009, MMO posted a notice of intent to award to Aramark. [Ex. 10]
9. On August 21, 2009, the CPO received the letters of protest.

### **DISCUSSION**

The RFP established the evaluation criteria for the solicitation as follows:

6.1 General administration and Management Plan	30 points
Management Plan for the PPO	
Implementation Plan	
Proposed Staff	
Training and Development	
Facilities Management Software	
References	
6.2 Maintenance and Operations	25 points
References/Program Experience	
6.3 Planning and Construction	20 points

#### 6.4 Energy and Utility Systems

15 points

#### 6.5 Financial Proposal

10 points<sup>1</sup>

[Ex. 1, p. 31, Evaluation Factors]

The RFP required the offerors to submit two complementary, but separate offers: a technical proposal and a financial proposal. Aramark complied by submitting a price proposal and a technical proposal. However, Aramark included in its price proposal two pages of financial information regarding Aramark's costs; specifically, expenditures Aramark would make during the contract period that Aramark believed SCUS would view favorably. Aramark (i) "discounted" its price by \$535,000 for services that Aramark would not charge SCSU, (ii) offered an immediate financial investment of \$500,000 to pursue projects identified during a deferred maintenance study, an energy conservation study, and a landscape study and, (iii) offered to spend \$225,000 to purchase grounds and maintenance equipment. (Similar, but less detailed information, was also provided in Aramark's technical proposal.) Mr. Covey reviewed the information and decided that it did not fit as part of the price proposal demanded by the RFP. First, it did not address the price to the university, but rather costs Aramark would incur. Second, he believed it would explain similar cost information provided at the beginning of Aramark's technical proposal. He decided to remove the two pages from the price proposal and provide them to the evaluators for consideration as part of Aramark's technical proposal.

At issue before the CPO is the appropriateness of Aramark's actions in providing cost information in its technical proposal and Mr. Covey's actions in sharing the two pages of financial information with the evaluators.

### **CONCLUSIONS OF LAW**

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<sup>1</sup> MMO advised the offerors that "the allocated budget amount (for the contract was) up to \$5.3 million annually. Offerors were asked to offer a proposal "to obtain the maximum return on (that) investment." [Ex. 2, p. 4, Scope of Solicitation]

At issue are the questions of (1) whether Aramark inappropriately violated the requirements of the RFP by included financial information in its technical proposal in violation of the RFP, (2) whether it was appropriate for Mr. Covey to provide Aramark's two pages of financial information to the evaluators for their technical evaluation and (3) whether Aramark misrepresented its intentions with that information, thereby deceiving the evaluators. The issues will be addressed separately below.

(1) Whether Aramark inappropriately violated the requirements of the RFP by included financial information in its technical proposal in violation of the RFP.

Aramark did include some financial information in its technical proposal. For example, in its introduction, Aramark made statements regarding

- “An investment totaling nearly \$1.3 million to help accelerate the change process. These funds will be used to “jump start” the new facility management program by completing plans for energy, deferred maintenance, and landscaping with a \$500,000 campus enhancement fund for immediate investment in identified projects that provide significant operational savings or campus enhancement.” [Ex. 16, p. iii]
- “Immediate investment of \$1.26 in SC State University as part of our proposal to the institution (ARAMARK will provide the transportation support, start-up expenses, and studies – worth \$535,000 – at not cost to the University. In addition, we will provide capital investment of \$725,000 for equipment and campus enhancement.” [Ex. 16, p. viii]
- Beginning in the second year, our performance incentive component will, begin, which puts 25 percent of our management fee at risk if we do not meet the established performance range for each metric.

Unicco and Sodexo argued that such statements were inappropriate in the Aramark technical proposal, in that such statements should have been limited to the price proposal. The CPO disagrees. First, the statute imposes no requirement for separation of evaluation of price and evaluation of technical proposal – there was no violation of law. Second, the RFP asks the offerors to address costs of certain programs required by the RFP, e.g., “Describe the process you will use to implement the contracted management services. Include events, time schedules, “costs”, and the like” [Ex. 2, p.26, 4.1.1.1

Implementation plans] and “If your cost proposal requires operational savings in order to achieve this objective, then you must clearly describe how these savings will be achieved. Provide a very specific and detailed description for each cost saving measure” [Ex. 2, p. 22, 3.2.28 Cost savings]. While the assumption may be that this information would be provided as part of the price proposal, the RFP is not crystal clear. Third, offerors customarily include sales “fluff” in their proposals in order to garner attention. Finally, and most compelling, the state has no interest, or shouldn’t, in Aramark’s cost to accomplish the contract; we are only interested in the price Aramark plans to charge us. As is the case here, and all too often, the terms cost and price are used interchangeably, but they are not interchangeable. The statements that Aramark included in its technical proposal say nothing about nor reveal the price Aramark offered to the State.

(2) The appropriateness of Mr. Covey providing the two pages of financial information to the evaluators.

In its price proposal, Aramark provided two pages of financial information. Mr. Covey shared these two pages of financial information with the evaluators for consideration during their evaluation of the technical proposals. Those pages addressed Aramark's financial commitment to the project. One portion read:

ARAMARK recognizes that the proposal objectives require taking the facility management program to a higher level. In order to jump-start our change management process and ensure success, we plan to make a total investment of \$1.26 million in South Carolina State University as part of our proposal to the institution. ARAMARK will provide the transition support, start-up expenses, and studies – with a value of \$535,000-at **no cost to the university** and a capital investment of \$725,000 for equipment and campus enhancements. Following is a summary of the investment items and their respective value.” [Attachment to the protest letter] [Emphasis theirs] A second page itemized and explained the \$535,000. A second portion entitled Year One investment read, “Our investment in a partnership with South Carolina State University creates the right environment to contain costs. By absorbing start-up costs and providing up-front capital expenditures, we have created a platform from which SCSU and ARAMARK can establish a limitless partnership focused on elevating the facilities management organization and realizing the positive impact on the community and

infrastructure.” [Attachment to the protest letter] A second page itemized and explained the \$725,000.

At issue is whether Mr. Covey, by providing the two pages of Aramark’s financial information to the evaluators, distorted the evaluation and elevated the effect of Aramark’s price proposal above the 10 points allocated to price in the evaluation criteria stated in the RFP.

The Code requires, “Proposals must be evaluated using only the criteria stated in the request for proposals and there must be adherence to weightings that have been assigned previously.” [11-35-1530(7)] Further, the Code reads, “Award must be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the State, taking into consideration price and the evaluation factors set forth in the request for proposals.” [11-35-1530(9)] The RFP stipulated that price proposals would carry no more than a weight of 10 points, 10 of 100 possible total points available during the evaluation.

Unicco and Sodexo argued that Mr. Covey, by giving the two pages of financial information to the evaluators for their technical evaluation, inappropriately intermingled Aramark’s price proposal with its technical proposal and artificially elevated consideration of Aramark’s price by the evaluators. Unicco argued that the RFP specifically required that offerors “submit the following price information (its price proposal) as a separate document.” (Ex. 2, p. 43, Price Proposal) They argued by intermingling Aramark’s financial information with its technical proposal, Mr. Covey prejudiced the other offerors tainting the process in violation of the RFP’s requirement for separate submission of price proposals.

Aramark responded that the information provided to the evaluators by Mr. Covey did not address Aramark’s price and that its price proposal was never shared with the evaluators.

MMO argued that the RFP required offerors to submit a specific price proposal to include annual cost, overhead and profit, management fee, and other. MMO argued that the additional financial information submitted by Aramark did not represent the price SCSU would pay or fit into any of those price categories. As such, MMO argued that the two pages did not qualify as Aramark's price proposal to SCSU. Therefore, MMO argued that Mr. Covey could not have included the additional two pages of financial information provided by Aramark in the price evaluation so he, appropriately, shared it with the evaluators to consider with Aramark's technical proposal. MMO also pointed out that the two pages Mr. Covey provided to the evaluators regarded the same basic financial figures that Aramark included elsewhere in its technical proposal, the \$535,000, the \$725,000, and the \$500,000. [Ex. 16, p. iii & viii] In fact, Mr. Covey testified that he provided the two pages to the evaluators, in part, to help them understand, or avoid misunderstanding, the financial information Aramark included in the beginning of its technical proposal.

(3) Whether Aramark misrepresented its intentions with that information, thereby deceiving the evaluators.

Unicco alleged that Aramark misrepresented its intentions with the financial information at issue, that this information was misleading. Regarding misrepresentation by an offeror, the Procurement Review Panel has established that "misrepresentation is not a matter of responsiveness, not a matter of responsibility, and not a matter that makes the evaluators' actions arbitrary or capricious. Instead, misrepresentation is a matter of Good faith and should result in rejection of a bid/proposal when the misrepresentation is made in bad faith or materially influences an agency determination or evaluation." [In Re: Protest of PS Energy, Case No. 2002-9] Regarding misrepresentations by bidders, the Procurement Review Panel has also ruled that a protestant must not



merely prove a false statement, but also prove that the statement was made in bad faith or had a material influence on the award. Protest of PS Energy, Case No. 2002-9.

Regarding misrepresentation, the United States Comptroller General has written:

Generally, where a bidder has made an intentional misrepresentation concerning [a fact] that materially influences an agency's consideration of its offer or bid, we find that the misrepresentation provides a basis to reject the offer or bid or terminate the contract award based upon the misrepresentation . . . In such cases, we review the matter to determine whether the alleged misrepresentation was made in bad faith **or** materially influenced the agency's determination . . . A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact upon the determination. [Tucson Mobilephone, Inc., Comp. Gen Dec. B258408.3, 95-1 CPD Paragraph 267]

The CPO has reviewed the two pages of financial information that Mr. Covey provided the evaluators. In those pages, Aramark offered to spend \$535,000 in transition and start up management, transition and start-up materials and supplies; deferred maintenance needs assessment, energy management conservation, and campus landscape plan "at no cost to the University." Further, Aramark offered to make, in year one, a one time capital investment of \$725,000 to jump-start projects that Aramark would "depreciate over the contract term, interest free." [Attachment to the protest letter]

It has been argued that Aramark mislead the evaluators by misrepresenting this offer as a free gift. Whether the evaluators were misled is not the first question. First, Aramark must have made some statement of fact that is false. The CPO finds none. According to the face of the documents, Aramark did offer \$535,000 "at no [extra] cost to the University." Testimony by Jack Wixted of Aramark confirmed that offer. Further, Aramark offered to provide \$725,000 for a campus enhancement fund and grounds and custodial equipment. Aramark never said the \$725,000 was free. Rather, it is clear that the \$725,000 is part of Aramark's performance obligations for the total price offered, should it win the contract. The CPO finds no evidence that Aramark make misstatements of fact or intentionally attempted to deceive SCSU with the statements which seem perfectly clear on their face.

Even absent a misstatement of fact, the CPO is left with the testimony of the evaluators themselves and the comments on their score sheets.

Three evaluators, Dr. Valerie Fields, Ed.D., Mr. Joseph Pearman, CPA, and Mr. John Smalls, SCSU Senior Vice President, all testified that they misinterpreted this aspect of Aramark's offer.

The importance of this portion of Aramark's offer shows through clearly in their evaluation comments. In her comments, Dr. Fields wrote that Aramark's "Incentive – was appealing." [Ex. 15] Mr. Pearman wrote in his evaluation comments, "Excellent incentive plan."

Dr. Fields stated she received the two additional pages at or before the evaluation committee meeting and felt they were of special import because they were "over and above the 3-ring binder" (Aramark's technical proposal). Asked if the sheets influenced her in the scoring process, she answered "Of course, they did." She stated that she considered it to be "in addition to the RFP", but testified that Mr. Covey did not present it that way.

In his testimony, Mr. Smalls stated that he saw the additional two pages before he scored the technical proposals and that he "took it into consideration"; that it was "very important." In addition, Mr. Smalls stated that the two pages of financial information from Aramark's proposal that Mr. Covey submitted to the evaluators was "very misleading" and his "scores were based on it being an investment." To emphasis the point, Mr. Smalls, in his closing statement, stated that "Speaking for fairness, I cannot make representation to the President or the Board that I feel good about the selection." He asked, "How could you ignore it; \$1.2 million? I couldn't." He continued by stating "I am not convinced it was fairly done; I am not at this point."

### **DETERMINATION**

(1) Whether Aramark violated the requirements of the RFP by included financial information in its technical proposal in violation of the RFP.

The solicitation requires that offerors submit the price information outlined in Section 4.5 as a separate document. Aramark did not materially violate this provision. Even if they had, it would have been a matter of form that the procurement officer could have corrected. More importantly, Aramark simply did not reveal its price in the technical proposal at all, and the evaluators were unable to discern the relative price of the different offerors.

(2) The appropriateness of Mr. Covey providing the two pages of financial information to the evaluators.

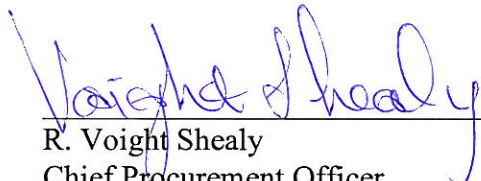
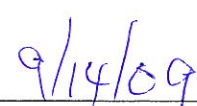
Mr. Covey did not violate the Code or the RFP in sharing Aramark's two pages of financial information with the evaluators, as those two pages did not reveal the price proposals of anyone, even Aramark. Unfortunately, Mr. Covey's actions helped precipitate further problems by emphasizing the two pages at issue. The unintended consequences were significant.

(3) Whether Aramark misrepresented its intentions with that information, thereby deceiving the evaluators.

Aramark's proposal mentioned an investment of \$535,000, but clearly stated that it would provide these services "at no cost to the university." Likewise, Aramark's proposal offered SCSU immediate investments of \$500,000 to be used to "pursue high-value projects identified during the deferred maintenance study, energy conservation plan and landscape plan" and \$225,000 to be used to "invest in grounds maintenance and custodial equipment necessary to deliver our proposed services." Aramark never stated that the \$725,000 investment was free. Aramark clearly noted that the \$535,000 discount off price was "at no cost to the University", but did not make a similar statement about the \$725,000 investment. Further, Aramark wrote, "Start-up and other expenses (\$535,000) are paid by Aramark and not charged to SCSU as a cost" but wrote further, "Other investment items are depreciated over the contract term, interest free." Clearly, Aramark did not state that its investment of

\$725,000 was free. The CPO finds no actual or attempted misrepresentation by Aramark. Aramark was quite clear that the \$725,000 capital investment was interest free, not free.

While the CPO finds no -- intentional or unintentional -- misstatement of fact, the testimony reflects that these financial figures resulted in serious misunderstandings by the evaluators. The law provides that evaluations are "final and conclusive, unless clearly erroneous, arbitrary, capricious, or contrary to law." [11-35-2410] Given the testimony cited above, several of the evaluators considered the award to be clearly erroneous by their very statements during the hearing.<sup>2</sup> Most compelling, Mr. Small's statements that, "I am not convinced it was fairly done; I am not at this point." Mr. Small is not only the chief financial officer of SCSU, but he was also an evaluator. Therefore, the CPO finds that the determination of award by the evaluators was indeed clearly erroneous. Accordingly, the protest is granted. MMO and SCSU are directed to resolicit for the facilities management services for SCSU.

  
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R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services  
  
  
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Date

Columbia, S.C.

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<sup>2</sup> This CPO does not recall ever hearing a case in which the evaluators testified at the hearing that there was a material misunderstanding of the successful offeror's proposal, much less having an evaluator condemn the process as unfair. While this Decision requires resolicitation, the CPO does so reluctantly. While the CPO does not doubt the honesty or sincerity of the evaluator's testimony, the work of the evaluation panel is over when they submit their final scores to the procurement officer. To then overturn the process in the absence of a misrepresentation simply because one or more evaluators misunderstood one or more proposals risks giving the evaluators, often interested agency staff, a second bite at the apple, a second opportunity to change their minds -- after all the pricing has been exposed. Little imagination is required to see the potential for mischief.



## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).